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ON

November 19, 2007

Pamela A. Campbell  
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Robbiati et al.	)	Group Art Unit: 3782
	)	
Application No.: 10/603,028	)	Examiner: Pascua, Jes F.
	)	
Filed: June 24, 2003	)	Attorney Docket No.: D-43515-01
	)	
Confirmation No.: 2614	)	

For: PACKAGING BAG, AND METHOD OF AND APPARATUS FOR  
MANUFACTURING THE SAME

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REPLY BRIEF UNDER 37 C.F.R. §41.41

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

The instant Reply Brief is being filed pursuant to the Examiner's Answer mailed September 28, 2007, for which the period of response expires November 28, 2007.

Although no fee is believed to be due, the Commissioner is hereby authorized to charge any fees that may be required, or credit any overpayment to Deposit Account No. 07-1765.

Favorable consideration is respectfully requested in view of the following Remarks.

## REMARKS

### I. Response to the Examiner's Withdrawn Rejections

Appellants hereby acknowledge that the Examiner has withdrawn the rejection of claims 1 and 7 under 35 U.S.C. §102(b) as allegedly being anticipated by the U.S. Patent No. 4,290,467 to Schmidt (hereinafter referred to as "the '467 Patent"), as set forth in the Examiner's Answer. Appellants further acknowledge that the Examiner has withdrawn the rejection of claims 2-6 under 35 U.S.C. §103(a) as allegedly being unpatentable over the '467 Patent, as set forth in the Examiner's Answer.

### II. Response to the Examiner's Assertions Regarding the Nonstatutory Obviousness-Type Double Patenting Rejection of Claims 1 and 3-10

Claims 1 and 3-10 presently stand rejected on the grounds of nonstatutory obviousness-type double patenting as allegedly being unpatentable over claims 1 and 5 of U.S. Patent No. 6,260,705 to Montepiani et al. (hereinafter referred to as "the '705 Patent") in view of the '467 Patent.

#### A. Response to the Examiner's First Assertion

In the Examiner's Answer filed September 28, 2007, the Examiner asserts at page 6:

The "slit" (or the open area between 25' and 21' of Fig. 9) of Schmidt meets the recitation of an "open mouth" to same degree as structurally set forth in independent claim 1. Although appellants intended use of the "open mouth" imparts no further structure to independent claim 1 to define the open area between 25' and 21' of Schmidt, the Schmidt reference clearly discloses the open area between 25' and 21' to be a portion of a bag where in a product or article is introduced into the open bag via a filling nozzle.

Appellants respectfully disagree. To elaborate, Appellants respectfully submit that as used in the subject application and claims, the term "mouth" refers to a means by which intended bag contents are inserted into the bag, and thereafter sealed to contain bag contents. Appellants particularly point to page 3, lines 11-16 of the subject specification, which recites:

A fourth aspect of the invention provides a method of packaging, comprising taking a bag...and pneumatically inflating the mouth of said bag to separate the edge of said shorter first ply from said projecting edge of the second ply to initiate opening of the bag, and subsequently holding the bag open and introducing a product article into a respective said open bag.

Accordingly, Appellants respectfully submit that in the subject specification, the bag is filled by opening the mouth and directly inserting the desired bag contents thereinto. Appellants further point to page 7, lines 3-7 of the subject specification, which recites:

During the bag closing operation the mouth of the bag along the right-hand edge, corresponding to the right-hand end 7 of the bag in Figs. 1 and 2, is closed by any convenient mechanism, preferably by heat seal bars, and then the bag can be subjected to a heat-shrinking operation which serves to tidy the structure of the bag around a product article which was loaded therein before the bag closing operation.

Accordingly, Appellants respectfully submit that the "mouth" portion, as referred to in the subject specification, refers to an area into which package contents are loaded, then closed to define a sealed package. Such a feature of the bag disclosed in the '467 Patent clearly refers to fastener profiles 17' and 18'. Appellants particularly point to column 6, lines 11-19 of the '467 Patent, which recites (emphasis added):

If preferred, the bag blank strips may be fashioned as best seen in Figs. 8 and 9 from a unitary extruded single flat strip 60, on which the separable closure profiles 17' and 18' for the bag and the reinforcing rib closure profiles 33' and 34' are allocated on one face of the extruded blank strip 60 and properly aligned so that when the flat extrusion is folded along a line 61, the profiles 17' and 18' will match and close the bag pouch area.

Appellants further submit that separable fastener profiles 17' and 18' are not located between the edge of one ply and another edge of a folded over film portion, as set forth in independent claim 1 of the subject application. Thus, contrary to the Examiner's assertions, although the bag contents can be disposed through the area between 25' and 21' of the bag of the '467 Patent, the

area is not deemed the “mouth” portion of the bag because it does not refer to the area through which package contents are loaded, then closed to define a sealed package. Particularly, to open the bag of Figure 9 of the ‘467 Patent, a user would pull flange 19’ (having reinforced bead 25’ to facilitate pulling) to open closures 17’ and 18’. At column 3, lines 20-32, the ‘467 Patent recites:

To facilitate opening, a fastener-opening front pull flange 19 extends up from the fastener profile 17 and cooperatively a fastener opening rear pull flange 20, substantially longer than the front pull flange 19 extends up from the fastener profile 19. A panel 21 on the front of the rear pull flange 20 provides therewith a plural thickness header 22 for the bag. The panel 21 has its opposite sides 23 secured to the rear pull flange 20, and a lower edge 24 of the panel 21 is located adjacent to, but preferable free from the front pull flange 19. Desirably, the front pull flange has at or adjacent to and along its upper edge, a narrow reinforcing bead 25 to facilitate gripping the pull flange 19.

Therefore, Appellants respectfully submit that 17’ and 18’ of the ‘467 Patent define the mouth of the package, not 21’ and 25’ as asserted by the Examiner. Thus, at best, the open space defined by 21’ and 25’ can be used to insert a loading device into the mouth portion of the bag (17’ and 18’), by which 17’ and 18’ can match and close the bag to surround the package contents. Accordingly, Appellants respectfully submit that the two bag mouth locations are not art-recognized equivalents, as set forth by the Examiner.

B. Response to the Examiner’s Second Assertion

The Examiner further asserts that there is no foundation for Appellants’ contention that the support function of the upper portion of the bag of the ‘467 Patent would be compromised if the bag were equipped with an open mouth covering a folded over portion less than 5% of the total length of the bag. See, Examiner’s Answer, page 7, paragraph 2.

In response, Appellants assert that in the Appeal Brief filed on June 21, 2007, Appellants argued that the ‘467 Patent appears to teach away from a packaging bag wherein the length of the folded over film portion is less than 5%

of the total length of the bag. Particularly, Appellants asserted that the intended function of the upper portion of the bag of Figure 9, comprising profiles 33' and 34' and rib 28' is to reinforce the bag and to provide support for heavy bag contents. Accordingly, Appellants reasoned that if the bag of the '467 Patent were equipped with an open mouth comprising a folded over portion that was less than 5% of the total length of the bag as recited in independent claim 1 of the subject application, it appears that the stated support function of the upper portion of the bag of the '467 Patent would be compromised.

Appellants particularly point to column 3, lines 36-40, which recites: "Above the holes 27, a header reinforcing rib structure 28 is provided securing the upper edges of the panel 21 and the rear pull flange 20 together and stiffening the header 22 against sagging under the weight of the package contents 12 when the bag is hung on the hanger." Appellants contend that the referenced passage of the '467 Patent provides support for the contention that one of the functions of the header (top) portion of the bag is to provide support for withstanding the weight of the bag contents. Accordingly, Appellants assert that if the bag of the '467 Patent were equipped with an open mouth as set forth in independent claim 1 of the subject application, the support function would be compromised.

Thus, because the stated function of the upper portion of the bag disclosed in the '467 Patent discloses supporting heavy bag contents, it would appear reasonable that adding an open mouth portion wherein the length of the folded over film portion is less than 5% of the total length of the bag would indeed compromise the intended function of the upper portion of the bag.

C. Response to the Examiner's Third Assertion

At page 7, paragraph 2 of the Examiner's Answer, the Examiner asserts that:

Furthermore, appellant's specification fails to provide an adequate written description of the criticality of the folded over portion being less than 5% of the total length of the bag or any of the other claimed lengths. Therefore, the Examiner maintains it would have been an obvious matter of design choice at the time the invention was made to make the length of the folded

over film portion whatever dimension was desired (e.g., "less than 5% of the total length of the bag", "less than 3% of the total length of the bag", "less than 1 cm", "less than 8 cm", "less than 0.5 cm"), since such a modification would have involved a mere change in size of the component. A change in size is generally recognized as being within the level of ordinary skill in the art.

In response, Appellants respectfully submit that the initial rejection under the above-noted basis was set forth in the Official Action mailed July 17, 2006, wherein the Examiner asserted at page 4, paragraph 1, "A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955)". Appellants respectfully submit that while this proposition may have some general validity, it is inapplicable in the present instance. In *In re Rose*, the invention at issue involved the stacking and bundling of lumber of certain lengths. All the lengths of lumber were apparently disclosed in the prior art, but not in the arrangement claimed by Rose, where bundles of equal length were made compared with prior art bundles of lumber of random length. The "size" referred to by the Court referred to Rose's attempt to distinguish his package of considerable size and weight, which required a lift truck to be lifted, compared with prior art bundles which could be lifted by hand. *In re Rose* is therefore believed to be inapplicable to the present claims, where the claimed combination, including the limitation in size, offers the benefits disclosed in the application (*i.e.*, resistance to curling experienced with prior art bags, etc.)

In this regard, Appellants specifically point to page 4, lines 6-21, which recites (emphasis added)"

The mouth of the bag is at the end opposite the closed end 1a and is formed by a singly folded portion 7 of the second main panel 3 and a cut edge 6 of the first main panel 2. The manufacture of the mouth end involves slitting the flattened tubular film of the plastic material used for the bag (12 in Figs. 2 and 3) in proximity of the second of the two folds thereof, the first fold being to define the closed end 1a, described above, of the bag. The production of the mouth end involves forming a cut at 7a in one of the two flat plies of the flattened tubular film in proximity to the second fold 7 referred to above, in order to separate the first main ply from the co-planar folded over part of

the film margin at the fold 7. As a results, at the mouth end the folded end of the second main ply exhibits a double thickness of the film in one wall which projects beyond the end 6 of the first main ply (other wall), thereby (i) allowing easier pneumatic inflation of the bag mouth in order to open the bag 1 for loading purposes, and (ii) resisting the wrinkling in that the increase in thickness of the end of the panel 3 at the folded end of the second ply helps to resist the tendency, which the bag material would otherwise have, to curl, as described above.

Accordingly, Appellants respectfully submit that the specification of the subject application sets forth that the mouth end is formed by a cut in one ply of the film in proximity to the second fold, allowing easier pneumatic inflation of the bag mouth, and resistance to wrinkling. Thus, Appellants respectfully submit that the specification discloses that the folded over portion is in proximity to the end of the bag, providing added benefits. See also, for example, page 10, lines 5-11 of the subject specification, which recites that: "The distance between the cut edge 6 of the first main panel 2 and the fold 7 of the second main panel 3, that corresponds to the length of the turned over lip, is typically below about 5%, and preferably below about 3% of the total length of the bag..."

Accordingly, Appellants respectfully submit that independent claim 1, which recites that the folded over portion of the bag mouth is less than 5% of the total bag length, is supported in the specification. Appellants further submit that the specification sets forth that such a feature provides an advantage over prior art bags; particularly, easier pneumatic inflation of the bag mouth and wrinkle resistance. Thus, Appellants submit that the presently disclosed claims are not directed merely to a "reduction in size" as set forth by the Examiner, but rather set forth a solution to a problem experienced with prior art packaging bags.

D. Response to the Examiner's Fourth Assertion

The Examiner asserts at page 8, first paragraph of the Examiner's Answer:

In response to appellant's argument that the Schmidt reference fail to show certain features of appellant's invention, it is noted that the features upon which appellant relies (i.e., the folded over portion being in the bottom 5% of the bag) are not recited

in the appealed claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims.

In response, Appellants respectfully submit that in the passage upon which the Examiner relies (page 16, last paragraph of the Appeal Brief), Appellants are simply furthering the argument that supplying a mouth portion wherein the length of the folded over film portion is less than 5% of the total bag length would not be an obvious design choice in the '467 Patent. Appellants asserted that it would not be obvious to relocate the mouth portion to the upper 5% portion of the bag or the lower 5% of the bag. Appellants respectfully submit that the argument was not intended to be limiting in any way.

III. Response to the Examiner's Arguments Regarding the 35 U.S.C. §103(a)  
Rejection of Claims 1 and 3-10

The Examiner has rejected claims 1 and 3-10 under 35 U.S.C. 103(a) as allegedly being unpatentable over the '705 Patent and the '467 Patent. In the Examiner's Answer, the Examiner simply repeats the same arguments set forth in the Double Patenting rejection set forth hereinabove.

Accordingly, Appellants respectfully submit that the same arguments presented in response to the nonstatutory obviousness-type double patenting rejection can equally be applied to the 35 U.S.C. §103(a) rejection of claims 1 and 3-10. Accordingly, for all the foregoing reasons, Appellants respectfully submit that the combination of the '705 Patent in view of the '467 Patent does not teach each and every element of independent claim 1. Accordingly, the instant 35 U.S.C. §103(a) rejection of independent claim 1 as allegedly being unpatentable over the '705 Patent in view of the '467 Patent is believed to have been addressed. Thus, Appellants respectfully request that the Examiner's rejection of claim 1 be reversed at this time. A Notice of Allowance is also respectfully requested.



IV. Conclusion

For the reasons stated hereinabove, as well as those set forth in the Appeal Brief filed June 21, 2007, Appellants respectfully request that the instant rejections be reversed and that all claims on appeal be allowed.

Respectfully submitted,

Date: 11-19-07

By:

A handwritten signature in black ink, appearing to read "Priscilla Ashley Darden", written over a horizontal line.

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